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IN THE

Supreme Court of the United States

(OCTOBER TERM 1954)

ROSA GRIFFIN, Administratrix of the Estate of GEORGE GRIFFIN, SR., Deceased.....Petitioner

vs. No._____

UNITED STATES OF AMERICA.....Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Comes Rosa Griffin, Administratrix of the Estate of George Griffin, Sr., deceased, and petitions this honorable Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, and the cause therein styled, United States of America, Appellant, vs. Rosa Griffin, Administratrix of the Estate of George Griffin, Sr., deceased, and number by that Court 15,032, and respectfully shows the court:

I.

OPINIONS OF THE COURTS BELOW

The opinion by the United States Court of Appeals for the Eighth Circuit has not been reported in the Federal Reporter. It appears in the Appendix at page 14.

The opinion of the United States District Court for the Western District of Arkansas appears in 115 Federal

Supplement at page 509. It is set out in full in the record beginning at page nine of the record of the Court of Appeals, filed herewith.

II.

GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The date of the judgment sought to be reviewed, which is also the date of entry, is October 29, 1954 (Appendix 24).

(ii) The date of the order staying the issuance of the mandate is November 16, 1954. (Appendix page 25).

(iii) The statutory provisions believed to confer on this court's jurisdiction to review the judgment or decree by Writ of Certiorari is Title 28 USCA Section 1254, June 25, 1948, C-646, 62 Statutes 928.

(iv) The Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court.

(v) The Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court.

(vi) The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

III.

QUESTIONS PRESENTED FOR REVIEW

1. Can an Army Regulation, not adopted or approved by the Veterans Administration, have the effect of depriving a serviceman of his National Service Life Insurance for the offense of absence without official leave, when the Acts of Congress provide that such insurance can be forfeited only for such crimes as treason, spying and desertion.

(a) Proper interpretation of Special Army Regulation 35-1900-5, requires payment of a premium from accrued active service pay as held by the Honorable John E. Miller of the U. S. District Court for the Western District of Arkansas.

(b) Interpretation of Army Regulation 35-1900-5 as contended by respondent and as approved by the Court of Appeals is void as being in conflict with specific provisions of National Service Life Insurance Act.

(c) The respondent did not show that the premium was not otherwise paid.

(d) The respondent had in its hands, funds sufficient to pay all premiums on the National Service Life Insurance policy and were obliged to do so to keep it in force and prevent a forfeiture.

(e) A post humous award by the Secretary of the Army of an honorable service certificate certifying that the service man died "while in the service of our Country" and that it was awarded "as a testimonial for honest and faithful service," was a formal, final judgment on the entire military career of the deceased service man and removed any bar that might exist to recovery under the National Service Life Insurance Act.

IV.

STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, treaties, statutes, ordinances and regulations which this case involves are:

Sec. 602 (m) of the National Service Life Insurance Act of 1950, c757, 54 Stat. 1008, as amended, 38 U.S.C. 802 (m), Sec. 612 and 812 of 38 U.S., the pertinent parts of which are set out in the appendix hereto at page 26. Special Army Regulation 35-1900-5 proved in evidence (R-36) and set out in the appendix at page 27. Veterans Administration Regulation 38 C.F.R. 1949 Ed. (Sec. 8.18) shown in the appendix at page 32. Special Army Regulation 600-45-3 17 May 1949, the pertinent parts of which are set out Stipulation No. 14 and appears in the appendix at page 32.

STATEMENT OF THE CASE

This suit was instituted by George Griffin, Sr., against the United States of America to recover the death benefits of a National Service Life Insurance Policy and was brought in the United States District Court for the West-

ern District of Arkansas. George Griffin, Sr., the beneficiary named in the policy, subsequently died, and his widow, Rosa Griffin, the alternate beneficiary in the policy, was named administratrix of the Estate of George Griffin, Sr., in whose name it has continued.

Although the Veterans Administration denied the claim on the sole ground that George Griffin, Jr., the service man, was a deserter, the respondent offered two defenses in the Trial Court. First, that Griffin, Jr., was a deserter, and second, that the premium had not been paid.

George Griffin, Jr., the service man, was inducted into the Army of the United States, April 20, 1945 and discharged January 23, 1946, and on January 24, 1946, he re-enlisted in the Army and continued in service until May 5, 1949, when he was honorably discharged, having served two years, eleven months and eight days overseas. On May 6, 1949, Griffin enlisted in the Reserve Corp, and on October 11, 1950 was recalled to active duty. On October 13 he applied, and was granted National Service Life Insurance in the amount of $10,000.00 and policy number V-1521-14-49 was issued to him, with George Griffin, Sr. as principal beneficiary. In his application the insured selected as a method of payment of premiums, an allotment to be taken from his active service pay.

On November 28, 1950, Griffin, Jr., left Camp Stoneman, California, and did not return before his death on March 24, 1951. He died at the home of his parents in Clarksville, Arkansas as a result of a cerebral hemorrhage. The military authorities at Camp Chaffee, Arkansas took control and possession of the body, and caused an autopsy to be performed. Thereafter, a military funeral was conducted by the army and the flag was presented to his mother, Rosa Griffin, and still later the Statutory gratuity was paid to the insured's parents.

From the time he left Camp Stoneman until his death, George Griffin, Jr. was suffering mental and physical difficulties. (Finding of Facts #7 by Trial Court R-14).

Major Walter C. Hudson investigated the death of Griffin, Jr., and submitted a complete report of his find-

ings, conclusions and opinions on April 10, 1951. It was approved by the Adjutant General April 24, 1951, and sent to the Secretary of the Army. On June 4, 1951, the Secretary of the Army, after having an opportunity to read and consider the report, as well as the insured's military record, and any other pertinent information, executed and caused to be delivered to George Griffin, Sr., a certificate of honorable service, which could only be issued to the next of kin, "in recognition of services rendered by those who die in line of duty while in active military service", Army Regulation 600-45-3, 17 May 1949. The honorable service certificate under the Great Seal of the United States says:

> "This is to certify that Pvt. George Griffin, Jr. died while in the service of our country as a member of the Army of the United States on the 24th day of March, 1951. This certificate is awarded as a testimonial of honest and faithful service.
>
> /s/ Frank Pace, Jr.,
> Secretary of Army."

At the time Griffin, Jr., left Camp Stoneman, and at the time of his death, the United States was indebted to him in the amount of $64.31 as his regular active service pay for the period from November 1, to November 28. Capt. William L. Otis, purporting to act under the authority of Special Regulation 35-1900-5, 10 October 50, on February 28, 1951 executed Form DD-234 and on March 6, 1951, Lt. Col. F. S. Stratton, disbursing officer, discontinued the insured's allotment effective as of November 1950, but no disposition of the service pay was made. Monthly premium of the policy was $7.20 and the amount held by the army was more than sufficient to pay all premiums that accrued from the date of the policy to the date of death.

This case was tried before the Honorable John E. Miller, United States District Judge, Western District of Arkansas, and his Findings of Fact have not been challenged.

On the defense offered by the respondent that George Griffin, Jr., was a deserter, the court held as a fact,

"Throughout the time the insured was absent without leave, he actually intended to return to Camp, and would have done so had it not been for physical and mental difficulty he was experiencing." The Trial Court also held that the honorable service certificate was the equivalent of an honorable discharge and that as a matter of law, it constituted a formal, final judgment upon the entire military record of the soldier and was binding on the government. The respondent did not appeal to the Court of Appeals for the Eighth Circuit on these issues.

On the defense of non-payment of premium, the Trial Court held,

> "*** A proper construction of this regulation is that such allotments are to be discontinued only when there is no accrued active service pay from which to deduct the amount of said allotment. In the instant case there was accrued active service pay in the amount of $64.31, and this money should have been used to pay the insured's insurance allotment. To construe the regulation otherwise, in the opinion of the court, would render it invalid. Certainly, the offense of being absent without leave cannot be made by regulation, a ground for forfeiture of National Service Life Insurance. Title 38 USCA Sec. 812, names the only acts which will forfeit such insurance, and new grounds for forfeiture cannot be added by regulation. Furthermore, Title 38 USCA Sec. 802 M-1, provides that premiums, at the election of the insured may be deducted from the insured's active service pay. In the instant case, the insured in his application, selected that method of payment. The Court is of the opinion that this selection is a part of the insurance contract and that the defendant, as long as there was accrued active service pay, owing to the insured, was required to pay the insurance premium. If the regulation were construed to permit the defendant to hold in its possession, accrued active service pay, and refuse to pay the premiums, as specified in the application for in-

surance and authorized by Section 38 USCA 802 M-1 supra, it would be invalid."

The Court of Appeals interpreted the regulation differently, and resolved its apparent doubts in favor of the respondent, saying:

> "The question whether the Army Regulation is consistent with 802 M-1 of Title 38 USCA is not free from doubt, and there can be an honest difference of opinion about it."

The basis of federal jurisdiction in the court of first instance is that the suit is brought against the United States, under the specific provisions of the National Service Life Insurance Act.

VI.

ARGUMENTS ON REASONS RELIED ON FOR ALLOWANCE OF WRIT

(a) The Court of Appeals has decided an important question of Federal Law, which has not been, but should be settled by this Court.

That there is a federal question, is established by the opinion of the Court of Appeals, wherein it is stated,

> "The question whether the Army Regulation is consistent with Section 802 M-1 of Title 38 USCA is not free from doubt and there can be an honest difference of opinion about it."

That it is an important question is likewise established in the opinion of the Court of Appeals wherein it is said:

> "The question of the validity of the regulations applicable to this case is important to the plaintiff and to the government. The plaintiff, if she elects to do so, may apply to the Supreme Court for Certiorari without payment of any further clerk's fees or costs in this Court."

It is important that the provisions of the National Service Life Insurance Act that the policies shall be forfeited only for the crimes of spying, treason and deser-

tion and shall not be circumvented by a regulation issued by the Army, not approved by, or issued by the Veterans Administrator. It is important that the "benevolent purposes" of the National Service Life Insurance Act, as expressed by this Court shall not be destroyed by indirection.

Although the burden of proof in this case was upon the respondent to establish non-payment of premium, the only proof on the issue was that the allotment had been discontinued under an Army Regulation, notwithstanding possession by the Army of funds sufficient to discharge all premiums. It was assumed in the Court of Appeals that the premiums were not "otherwise paid", but there was no proof in that regard. This regulation, if upheld, as construed by the Court of Appeals, and on the proof in this case, has the effect of forfeiting the insurance for the minor offense of absence without leave and regardless of whether that absence has been found to be unavoidable or excusable.

In this instance, the Secretary of the Army found the absence unavoidable or excusable as evidenced by the certificate of honorable service, but George Griffin, Jr. had the misfortune to die before he could be restored to duty and therefore, under this regulation he forfeited his insurance. Your petitioner submits that the regulation circumvents the spirit and meaning of the National Service Life Insurance Act, and that the question is of importance in the administration of that Act. The respondent apparently considers it important that the regulation be upheld so that a finance officer would not be inconvenienced by keeping records open for a period of time, but your petitioner feels it is more important that the purpose of the National Service Life Insurance Act be accomplished, and that the insurance maintained in force where there is an allotment made and money available to do so.

(b) The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

In the case of *United States vs. Zazove* 334 U. S. 602, 92 L. Ed. 1601, the Court said:

> "The statutory provisions, where ambiguous, are to be construed liberally to effectuate the beneficial purposes that Congress had in mind."

and in speaking of the administrator's general rule making power, this Court said:

> "***The regulations of the Veterans' Administration are subject to more than casual judicial scrutiny when they are based upon a controverted construction of the statute."

Here we have a regulation, not of the Veterans' Administration, but of the Army, which as construed by the Court of Appeals, has the effect of forfeiting the insurance for an excused offense, whereas, the Act provides for forfeiture only for such high crimes as treason, spying and desertion.

The Court of Appeals dismissed the question of the certificate of honorable service as having no materiality. The Trial Court held the certificate to be the equivalent of an honorable discharge. This Court in the case of *United States vs. Thomas W. Kelly,* 82 U. S. 36; 21 L.Ed. 106, said:

> "An honorable discharge of a soldier at the end of his service, is a formal, final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a status of honor, and removed any charge or impediment in the way of his receiving bounty."

Under the authority of this decision, and the decisions of the Circuit Court of Appeals in Ex parte Drainer 158 F 2d 981, in re Fong Chew Cung 149 Fed 2d 904, the certificate of the Secretary of the Army was a formal, final judgment on the entire military career of the insured, George Griffin, Jr., and that the characterizing him by Capt. Otis, or any other subordinate officer as AWOL and the cancellation of the allotment, and a con-

sequent forfeiture of the insurance was unjustified. It is a finding that he was on active duty, and if he had ever been AWOL, he had been restored.

Petitioners submit that the Court of Appeals has erroneously failed to apply the proper decisions of this Court and the decision is in conflict therewith.

(c) The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

In the case of *United States v. Morrell,* 4 Cir., 204 F. 2d 490, the Court said:

> "It does not appear that the interests of the government would be jeopardized in a case of this kind by the application of the wholesome rule against the enforcement of unnecessary forfeitures of contracts of insurance. To the disfavor in which forfeitures are generally held there is added in the case of the government the benevolent purpose of the National Service Life Insurance system to furnish to service men at low cost, insurance otherwise unobtainable; and it cannot be supposed that it was the intent of Congress that the system should be technically administered.***."

The Court of Appeals in this case reconciles its opinion with *United States v. Morrell* and sums up the facts in the Morrell case as follows:

> "In that case it appeared that the insured, before his death, had paid premiums which he was entitled to have waived and which, if applied to his policy, were sufficient in amount to have carried it in force until his death. The credit to which the insured was held entitled in that case constituted, in effect, an overpayment of premiums and was directly related to his insurance contract."

The Trial Court in its opinion said:

> "But, in the instant case, plaintiff is only seeking to have the accrued active service pay, which

is the fund specified by statute and by the insured's application for insurance, used for the payment of premiums, and the Court has concluded that the plaintiff has the right to have said fund so applied."

The Court of Appeals took the position that cancellation of the allotment by an arbitrary act of the commanding officer left the insured in no better position than he would have been in had he never made any allotment, and in this manner reconciles its decision with the decision of the Morrell Case. Nevertheless, petitioner submits that the effect of the opinion of the Court of Appeals for the Eighth Circuit is to leave it in conflict with the fundamental principles expressed in the Morrell Case, calling for the application of the wholesome rule against unnecessary forfeiture and the expression of the principal purpose and spirit of the National Service Life Insurance Act to carry out the benevolent purpose intended by Congress.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable Court, directed to the United States Court of Appeals for the Eighth Circuit, and upon the granting of said writ, and consideration of this case on its merits, this honorable Court reverse the decision of the Court of Appeals for the Eighth Circuit and affirm the judgment of the Trial Court and that the petitioner have such other relief in the premises as to this Court may seem mete and just.

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,032

UNITED STATES OF AMERICA, APPELLANT	) Appeal from the) United States
vs.	) District Court
ROSA GRIFFIN, Administratrix of the Estate of George Griffin, Sr., Deceased APPELLEE	) for the Western) District of) Arkansas

(OCTOBER 29, 1954.)

Alan S. Rosenthal, Attorney, Department of Justice, (Warren E. Burger, Assistant Attorney General, Charles W. Atkinson, United States Attorney, Henry M. Britt, Assistant United States Attorney, and Melvin Richter, Attorney, Department of Justice, were with him on the brief), for Appellee.

Before Sanborn, Woodrough and Johnsen, Circuit Judges.

Sanborn, Circuit Judge.

George Griffin, Sr., the principal beneficiary under a policy of National Service Life Insurance issued to his son George Griffin, Jr., while on active duty in the Army, brought this action on March 28, 1952, against the United States upon the claim (previously disallowed by the Veterans Administration) that the policy was in force at the time the insured died on March 24, 1951, while absent without leave from his assigned station. During the pendency of the action, George Griffin, Sr., died and Rosa Griffin, administratrix of his estate, was substituted as plaintiff.

Two issues were presented by the pleadings and tried to the court: (1) whether the insured was guilty of desertion and had thereby forfeited his rights under the policy, and (2) whether the policy had lapsed for nonpayment of premiums. The court found in favor of the plaintiff on both issues and entered judgment against the United States for the proceeds of the policy. The Government has appealed, but challenges only the court's

ruling that the policy had not lapsed for nonpayment of premiums at the time the insured died.

The question presented for decision is whether, in view of the insured's allotment for payment of premiums, uncollected active-service pay earned by him prior to the time he absented himself without leave from his assigned military station was to be applied to continue his National Service Life Insurance in force during the period of such absence without leave.

The facts with respect to that question are stipulated, and, so far as essential, may be summarized as follows:

On October 11, 1950, George Griffin, Jr., a member of the Army Enlisted Reserve Corps, entered upon extended active duty. On October 13, 1950, he made an application for level-premium five-year term National Service Life Insurance in the amount of $10,000, naming his father, George Griffin, Sr., as principal beneficiary, and his mother, Rosa Griffin, as contingent beneficiary. Under the heading in his application form, "Method of Payment of First Premium (Chech one)," he checked: "Allotment from Advanced Active Service Pay, under the Provisions of Public Law 451, 77th Congress. Month Allotment Effective: Nov. 50 (2 ded.) (two deductions)." There was also a check mark before "Allotment from Active Service Pay. Month Allotment Effective: Nov. 50 (2 ded.)" On the day he made his application, the insured executed Standard Form DD 234 authorizing an allotment from his pay to cover a premium of $7.20 a month, referring specifically to the premiums for November and December, 1950. The insured's application was approved, effective November 1, 1950, and an allotment was made from the insured's service pay for the November and December premiums. This was a so-called Class "N" allotment.

On November 28, 1950, the insured absented himself without leave from his assigned station, Camp Stoneman, California, and did not return to military duty at any time prior to his death on March 24, 1951, which occurred at the home of his parents in Clarksville, Arkansas. At the time he went AWOL he was placed in a nonpay

status, but was credited with $64.31 in accrued service pay for the period November 1, 1950, to November 28, 1950. For obvious reasons, the insured did not apply for or collect this pay. On February 28, 1951, Capt. William L. Otis, at Camp Stoneman, pursuant to Army Special Regulation 35-1900-5 October 10, 1950, executed Form DD 234 for the purpose of terminating the insured's allotment as of November, 1950. This form recited that the "Final Deduction to be Made" was "Dec. 1950," and the "Reason" "AWOL fr. 28 Nov. 1950." On March 6, 1951, the allotment was discontinued as of the end of November, 1950.

Special Army Regulation 35-1900-5 relative to discontinuing allotments, contains the following pertinent provisions:

"1. Action upon discontinuance.

"a. * * *

* * * * * * * * * *

"(6) When a person is in a continuous nonpay status for 10 days or more, e. g., AWOL, the personnel officer will prepare separate Forms 234 for each class of allotments (E, D and N) and forward such forms promptly to the disbursing officer having custody of the person's military pay record.***Upon receipt of Forms 234, the disbursing officer will discontinue deductions of such allotments by closing out the entry on the Military Pay Record (NME Form 113) of the individual concerned.*** The notation 'AWOL' on Form 234, without the signature of the alloter, is sufficient authority for discontinuance of any allotment in effect.

* * * * * * * * * *

"3. Effective date of discontinuances.

* * * * * * * * * *

"b. Involuntary discontinuances.

"(1) Whenever, because of reduction in grade, stoppage of pay, absence without leave, or for any other reason, a class E, D, or N allotment is discontinued involuntarily, the effective date of discontinuance *** will be as follows:

* * * * * * * * * *

"(b) Class D and N allotments will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the alloter from which the deduction may be made."

According to the terms of this Army Regulation, the Class N allotment of the insured was properly terminated as of the end of November, 1950, since no service pay accrued to the insured after that time. No insurance premiums were paid or deducted thereafter.

The District Court was of the opinion that a proper construction of the Regulation was that Class N allotments were to be discontinued only when there was no accrued service pay from which to deduct premiums; that in this case the Government was obligated to continue to pay premiums out of the insured's uncollected service pay; that the offense of being absent without leave could not by regulation be made a ground of forfeiture of National Service Life Insurance; that 812 of Title 38 U.S.C.A. specifies the only grounds of forfeiture; that Title 38 U.S.C.A., 802 (m) (1), provides that premiums, at the election of the insured, may be deducted from the insured's active-service pay; that the insured had selected that method for the payment of premiums; that so long as there was uncollected active-service pay owing the insured, the Government, notwithstanding his being absent without leave, was required to continue to deduct monthly premiums from his accrued service pay; and that if the Regulation was otherwise construed it would be invalid as contrary to the letter and spirit of the National Service Life Insurance Act permitting an insured to elect to have premiums deducted from his active-service pay.

The contentions of the Government are, in substance, as follows: That November, 1950, was the last month during which pay accrued to the insured from which a premium deduction could be made; that, in discontinuing the insurance allotment, the Army complied with Special Regulation 35-1900-5; that this discontinuance did not forfeit the insurance but transferred to the insured the responsibility for payment of premiums; that under

regulations of the Veterans Administration, if an allotment is so discontinued and the premium is not otherwise paid prior to the expiration of the 31-day grace period the insurance lapses, 38 C.F.R. (1949 Ed.) 8.18; cf. 38 C.F.R. (1949 Ed.) 8.14, 8.16, 8.20; that the applicable regulations were not invalid and the Government was not obligated to apply the insured's accrued service pay to the payment of premiums after he went AWOL; that 602 (m) of the National Service Life Insurance Act, 802 (m) of Title 38 U.S.C.A., does not require the deduction of premiums from uncollected service pay of a serviceman in a nonpay status; that 802 (m) (2), Title 38 U.S.C.A., read in the light of the legislative history, shows that the Army may discontinue insurance allotments even automatically when a serviceman is AWOL; that 802 (m) of Title 38 U.S.C. (1940 Ed.), 602 (m) of the Act, 54 Stat. 1011, as originally enacted in 1940, provided that premiums could, at the election of the insured, be deducted from his active service pay; that by Section 6 of the Act of August 1, 1946, 60 Stat. 784, 602 (m) was amended by adding the following as subsection (2):

> "In any case in which the insured provided for the payment of premiums on his insurance by authorizing in writing the deduction of premiums from his service pay, such insurance shall be deemed not to have lapsed so long as he remained in active service prior to the date of enactment of the Insurance Act of 1946 (August 1, 1946), notwithstanding the fact that deduction of premiums was discontinued because - -
>
> * * * * * * * * * *
>
> "(B) the insured was absent without leave, if restored to active duty;"

that the reason for this addition was stated as follows in the Senate and House Committee Reports;

> "Under regulations issued by the War Department, an allotment for deduction of premiums was automatically discontinued if the insured was absent without leave 15 days or more. Upon restora-

> tion to active duty, the individual was not advised that his allotment had been terminated, nor was he ever offered an opportunity to make a new allotment. Some such individuals also died believing their insurance was in force. In still other cases, a veteran sentenced by court martial was restored to active duty and required to engage in combat or was killed in combat while confined in a combat area or on a ship engaged in combat. In some instances, insurance had lapsed because the veteran was on a nonpay status. Your committee is of the opinion that payment of insurance benefits should not be denied under the circumstances stated.";

that Congress chose not to invalidate regulations requiring termination of the allotment of service men absent without leave, but to relieve them of the consequences of allotment termination in certain specified situations, not applicable to the insured in the instant case.

The Government also contends that the Army Regulation by which the insurance allotment of the insured was terminated is authorized as an adjunct to the allotment system, and is necessary in the proper administration of the Army; that the service branches must be able to adopt reasonable regulations to facilitate the performance of their complex fiscal duties; that Congress has recognized this; that Special Regulation 35-1900-5 does no more than give content to the fiscal meaning of the term "allotment"; that the allotment scheme contemplates a continuing income from which authorized deductions can be made; that the fact that there may remain to an allottee's credit monies owing as the result of past services, from which authorized deductions have already been made, has no significance; that the requirement that deductions be made from currently accruing pay is essential from an administrative standpoint; that under Army regulations an absentee without leave is dropped from the rolls of his organization after three months, and within two days thereafter his service record and allied papers are sent to the Adjutant General in Washington for disposition; that if the Army were to make monthly

payments from accrued pay until it was exhausted, the procedure the Army has adopted could not be followed; that, in the instant case, had the insured not died, the Army would have been obliged to keep his records in an active status for at least 8 months; that his accrued service pay could not be dedicated solely to the payment of premiums; that when a serviceman goes AWOL, expenses incurred in apprehending him are, under Army Regulations, chargeable against him, and his accrued pay stands as security for such indebtedness should it be incurred and also for any other obligations owed the Government; that in the case of a serviceman who has authorized several allotments from his pay and who absents himself without leave, it would be impracticable to determine how his accrued pay for past service should be applied.

The Government also contends that under Form DD 234, executed by the insured, the Army was merely called upon to deduct from his monthly pay a monthly premium of $7.20; that it lawfully could have done no more than that; and that, after the insurance allotment was terminated, the Government was under no obligation to apply his accrued service pay, which was thereafter in no way related to his insurance, to the payment of premiums on his National Service Life Insurance.

Section 802 (m) (1) of Title 38 U.S.C.A., so far as pertinent, provides:

> "The Administrator (of Veterans' affairs) shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active-service pay or be otherwise made:***."

The provisions of the Regulation of the Veterans Administration pertinent to the instant case are as follows (Section 8.18 of 38 C.F.R., 1949 Ed.):

"National Service Life Insurance will lapse and terminate while the insured is in the active military or naval service of the United States:

* * * * * * * * * *

"(b) *** if the service department shall discontinue the allotment (for payment of premiums) and premium is not otherwise paid prior to expiration of the grace period."

If the insured's allotment was lawfully discontinued by the Army as of November 30, 1950, his National Service Life insurance lapsed for nonpayment of premiums on January 1, 1951, pursuant to the above quoted regulation, unless it is inconsistent with the National Service Life Insurance Act. Regulations of the Veterans Administration, if consistent with that Act, have the force of law and are a part of the contract of insurance. *Jones v. United States,* 8 Cir., 189 F. 2d 601,602.

Since the discontinuance of the insured's allotment was not a forfeiture of his insurance, the controlling question, we think, is whether the Army regulation pursuant to which his allotment was terminated, and the regulation of the Veterans Administration providing for the lapse of his policy if the allotment was terminated and if premiums were not otherwise paid, are invalid.

The Veterans Administration, in adopting the regulation providing for the lapse of policies where allotments had been discontinued, seems to have done nothing more than Congress did when, in amending 802 (m) of Title 38 U.S.C., 602 (m) of the Act, it recognized that the Army, pursuant to its regulations, was discontinuing the insurance allotments of servicemen who were in a nonpay status. We think the regulation of the Veterans Administration is valid.

That leaves for consideration the question whether the Army was obliged to continue in effect the insurance allotment of an insured who went AWOL but had to his credit uncollected accrued service pay, and to deduct insurance premiums from such pay so long as it lasted. That is the troublesome question in this case.

From the viewpoint of the District Court, 802 (m) (1) of Title 38 U.S.C.A., permitting an insured to elect to have premiums deducted from active-service pay, means that so long as he has service pay current or accrued the Government must deduct premiums, and that only when all accrued pay is exhausted can his insurance allotment and the payment of premiums be discontinued. From the viewpoint of the Government, an insurance allotment is an authorization to deduct monthly premiums from monthly pay, and when monthly pay ceases there is no obligation and no authority to continue premium payments out of accrued pay from which premiums have already been deducted for the months the pay was earned. The question whether the Army regulation is consistent with 802 (m) (1) of Title 38 U.S.C.A. is not free from doubt, and there can be an honest difference of opinion about it.

The Army regulation requiring the discontinuance of the allotments of service men who absent themselves without leave is not an unreasonable one, has apparently been long established, and has received recognition from Congress. We feel justified in resolving in favor of its validity and effectiveness whatever doubts we might otherwise entertain.

If the insured had made no insurance allotment, his accrued service pay would not have been available to continue his insurance in force, for the reasons stated in *Mikell v. United States,* 4 Cir., 64 F. 2d 301, 302, in which it was said that "an insured who defaults in the payment of premiums on a government policy is not entitled to have his insurance continued in force merely because in some of its various activities, not connected with the insurance, the government is indebted to him." The case of *United States v. Morrell,* 4 Cir., 204 F. 2d 490, certiorari denied 346 U.S. 875, is not to the contrary. In that case it appeared that the insured, before his death, had paid premiums which he was entitled to have waived and which, if applied to his policy, were sufficient in amount to have carried it in force until his death. The credit to which the insured was held entitled in that case

constituted, in effect, an overpayment of premiums and was directly related to his insurance contract.

The District court was of the opinion that the cases holding that a fund not related to insurance may not be applied to the payment of premiums are inapplicable to the instant case because the "plaintiff is only seeking to have the accrued active service pay, which is the fund specified by statute and by the insured's application for insurance, used for the payment of premiums." But if the insured's insurance allotment was lawfully discontinued as of November 30, 1950, after he had absented himself without leave, his accrued service pay would, we think, be no more related to his insurance than it would have been had he made no such allotment, and was not available for the payment of premiums.

The plaintiff contends that because after the insured's death the Secretary of the Army issued to the father of the insured a Certificate of Honorable Service, which is issued to the nearest of kin in recognition of services rendered by those who die in line of duty while in active military service, that excused the insured's absence without leave and nullified the termination of his allotment.

The insured, at the time of his death, had either a matured policy or a lapsed policy. What happened after his death had, we think, no materiality relative to the question before us for review.

Our conclusion is that the judgment appealed from should be reversed. The question of the validity of the regulations applicable to this case is important to the plaintiff and to the Government. The plaintiff, if she elects to do so, may apply to the Supreme Court for certiorari without payment of any further Clerk's fees or costs in this Court.

The judgment appealed from is reversed and the case is remanded with directions to enter judgment for the United States.

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

No. 15032 September Term, 1954
Friday, October 29, 1954.

UNITED STATES OF AMERICA APPELLANT

Vs.

ROSA GRIFFIN, Administratrix of the Estate of George Griffin, Sr., Deceased

Appeal from the United States District Court for the Western District of Arkansas.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be, and the same is hereby, reversed without costs to either party in this Court.

And it is further Ordered by this Court that this cause be and the same is hereby remanded to the said District Court with directions to enter judgment for the United States.

October 29, 1954.

Order Staying Issuance of Mandate.

UNITED STATES COURT OF APPEALS
FOR THE
EIGHTH CIRCUIT

No. 15032 September Term, 1954
Tuesday, November 16, 1954

UNITED STATES OF AMERICA, APPELLANT.	) Appeal from the
Vs.	) United States
	) District Court
ROSA GRIFFIN, Administratrix of the Estate of GEORGE GRIFFIN, SR., Deceased.	) for the Western
	) District of
	) Arkansas

On Consideration of the motion of the appellee for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

November 16, 1954

National Service Life Provisions

1. Section 602(m) of the National Service Life Insurance Act of 1940, c757, 54 Stat. 1008, as amended, 38 U.S.C. 802 (m) provides as follows:

> (1) The Administrator shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active-service pay or be otherwise made: PROVIDED, That an amount equal to the first premium due under a national service life-insurance policy may be advanced from current appropriations for active service pay to any person in the active service in the Army, Navy, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collect therefrom if not otherwise paid: PROVIDED FURTHER, That no disbursing or certifying officer shall be responsible for any loss incurred by reason of the advance herein authorized: AND PROVIDED FURTHER, That any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 454a of this title.
>
> (2) In any case in which the insured provided for the payment of premiums on his insurance by authorizing in writing the deduction of premiums from his service pay, such insurance shall be deemed not to have lapsed or not to have been forfeited because of desertion under section 812 of this title, so long as he remained in active service prior to August 1, 1946, notwithstanding the fact that deduction of premiums was discontinued because - -
>
> (A) the insured was discharged to accept a commission; or

(B) the insured was absent without leave, if restored to active duty; or

(C) the insured was sentenced by court martial, if he was restored to active duty, required to engage in combat, or killed in combat.

In any case in which the insured under any insurance continued in force by the provisions of this paragraph died while such insurance was so continued in force, any premiums due on such insurance shall be deducted from the proceeds of the insurance. Any premiums deducted or collected on any such insurance shall be credited to the national service life insurance appropriation and any payments of benefits on any such insurance shall be made directly from such appropriation.

38 U.S.C.A. 812; Sec. 612, 54 Stat. 1013.

Any person guilty of mutiny, treason, spying, or desertion, or who, because of conscientious objections, refuses to perform services in the land or naval forces of the United States or refuses to wear the uniform of such force, shall forfeit all rights to insurance under this subchapter.

Army Regulation 35-1900-5

*SR 35-1900-5
AFR 173-60

Special Regulations
No. 35-1900-5
Air Force Regulation
No. 173-60

Department of the Army
and the Air Force

Washington 25, D.C., 10 October 1950

FINANCE AND FISCAL

DISCONTINUING CLASS E, D, AND N ALLOTMENTS

	Paragraph
Action upon discontinuance	1
Signature on DD Form 234	2
Effective date of discontinuance	3

1. Action upon discontinuance. - - a. DD Form 234 (Allotment Authorization). - - Under the conditions set forth below, class E, D, and N allotments will be discontinued by use of DD Form 234 (Allotment Authori-

zation). When discontinuing a class D or N allotment, DD Form 234 will be prepared in duplicate. When discontinuing a class E allotment, Form 234 will be prepared in triplicate, and the third copy clearly marked "Copy for allottee." The original Form 234 will be transmitted as outlined in SR-35-1900-15/AFR 173-65, the duplicate will be furnished the alloter, and in the case of a class E allotment, the third copy will be forwarded to the allottee by the certifying officer, omitting the reason for discontinuance in involuntary cases, and notation will be made on the original that copy has been furnished the allottee. Where the allotter is also certifying officer, he will make the required notation on the original Form 234 and furnish a copy of the form to the allottee. In the case of civilian employees discontinuing an allotment, an additional copy of Form 234 will be prepared and filed in the employee's 201 file.

(1) Request of the alloter.

(2) Change in allotments (see SR 35-1900-7/AFR 173-61).

(3) When, because of reduction in grade, stoppage of pay, or when for a reason other than absence without leave, the alloter's pay will not warrant continuance of the allotment.

(4) When forfeiture of pay by sentence of court martial is such that continuance of the allotment would prevent the collection of the forfeiture in full prior to the discharge of the allotter.

(5) When sentenced to forfeit all pay all allowances due after the date of the order directing the execution of

(fol.41a)

an approved sentence is adjudged by a general court martial, and dishonorable discharge is suspended.

(6) When a person is in a continuous nonpay status for 10 days or more, e.g., AWOL, the

personnel officer will prepare separate Forms 234 for each class of allotments (E, D and N) and forward such forms promptly to the disbursing officer having custody of the person's military pay record. In the event that it cannot be ascertained from available records whether or not allotments are in effect, separate Forms 234 for Class E, D, and N allotments will be prepared, with the space for amount of allotments left blank, and will be forwarded to the disbursing officer. If it can be readily ascertained that the person in a nonpay status could not have Government Life Insurance (class D allotment) in effect, Form 234 for class D allotment need not be prepared or forwarded. Upon receipt of Forms 234, the disbursing officer will discontinue deductions of such allotments by closing out the entry on the Military Pay Record (NME Form 113) of the individual concerned. Should the military pay record not contain an allotment, an appropriate remark will be entered on NME Form 113 in item 33 (Miscellaneous information) as to forwarding of Forms 234 to the appropriate allotment offices. The notation "AWOL" on Form 234, without the signature of the alloter, is sufficient authority for discontinuance of any allotment in effect.

(7) In the case of a civilian employee (allotter), upon his return to the continental United States (excluding Alaska).

(8) Change in status of the individual (see SR 35-1900-9/AFR 173-62).

(9) When insurance has been disapproved by the Veterans' Administration (par. 3c). For refund of reductions made due to disapproved insurance, see SR 35-2000-1/AFR 173-21.

b. WD AGO Form 30-S. WD AGO Form 30-S (Allotment Discontinuance Notice upon Discharge or Release

from Active Duty) will be prepared and distributed as prescribed in SR 35-1910-1/AFR 173-56.

2. Signature on DD Form 234. - - DD Form 234 will be signed (original only) by the allotter when prepared for voluntary discontinuances. When the form is prepared for involuntary discontinuances, it may be signed by the alloter, if available, or it may be signed by the commanding officer or personnel officer. In such case the grade, branch (fol. 41b) of service, and title of the personnel officer will be shown. The signature of the disbursing officer is not required in item 20 of Form 234. After pertinent data have been entered on the military pay record, the brief stamp of the disbursing officer will be entered in item 20.

3. Effective date of discontinuance. - - a. Voluntary discontinuances. - - The requested date of voluntary discontinuance of an allotment, except to correct an erroneous Class "D" or "N" allotment, will not be earlier than the end of the month in which the request is made. For example, if Form 234 is submitted in the month of November, the requested date of discontinuance in such case may be 30 November, and deductions from pay will terminate with the month of November. In cases where the allotment office is unable to terminate the allotment in accordance with the effective date on the form, that office will notify the proper disbursing officer. For example, where the alloter requests that a class E allotment be discontinued effective 30 November and, because of delay in receipt, the allotment office is not able to discontinue the allotment until 31 December, that office will advise the disbursing officer in order that an additional deduction can be made from the allotter's pay to cover the December allotment.

b. Involuntary discontinuances.

(1) Whenever, because of reduction in grade, stoppage of pay, absence without leave, or for any other reason, a class E, D, or N allotment is discontinued involuntarily, the effective date of discontinuance, except under the

provisions of (2) and c below, will be as follows:

(a) Class E. allotments will be discontinued as of the last day of the month preceding the month in which the request for discontinuance is made.

(b) Class D and N allotments will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the allotter from which the deduction may be made.

(2) Involuntary discontinuance of class D and N allotments, as well as class E allotments covering commercial life insurance premiums, should be approached with care as the allotter's insurance status is involved. Proper attention to the effective date of discontinuance will prevent many policies from lapsing unnecessarily. Whenever a class E, D, or N allotment of a person, other than one who is discharged or separated from active service, has been involuntarily discontinued the custodian of the service record will inform the (fol.41c) allotter as soon as possible thereafter concerning the following:

(a) The fact that the allotment has been discontinued, together with the effective date and the reason for the discontinuance. See SR 615-20-1/AFR 31-10 for service record entries.

(b) The effect of such discontinuance on the status of the insurance of the allotter, in the case of D or N allotments, or in the case of class E allotments for commercial insurance.

(c) The possibility of reauthorizing the allotment. See SR 35-1900-3/AFR 173-59.

c. Disapproval of insurance. - - In the case of a class D or N allotment, where the application for insurance is

disapproved by the Veterans Administration, the effective date of discontinuance will be the last day of the month preceding the commencement of the allotment. The Veterans Administration will advise the allotter through his immediate commanding officer of the disapproval of his application for insurance. (In such cases the Veterans Administration will forward to Insurance and Deposits Division, Army Finance Center, notice of disapproval. On the basis of this letter the Insurance and Deposits Division will take action to discontinue the existing allotment retroactive to the inception date. The letter will be forwarded to the individuals immediate commanding officer for necessary action and will be transmitted to the disbursing officer having custody of the service member's military pay record, authorizing refund of amounts previously deducted from his pay.) If the applicant has been separated from the service, the commanding officer will forward the letter of disapproval to the Insurance and Deposits Division, Army Finance Center, Building 204, St. Louis 20, Mo. The Insurance and Deposits Division will advise the Veterans Administration of the amount deducted from the allotter's pay and the last known address of the individual concerned, and request that refund be made to the individual.

Army Regulation 600-45-3

14. Attached hereto and marked Exhibit "10" is a certified copy of Special Regulation 600-45-3, 17 May 49, which is made a part of this Stipulation by agreement, and which provides in part:

"12. Certificate of Honorable Service and Record of Service (deceased military personnel) a. A Certificate of Honorable Service (AGO Form 01219) is issued to the closest of kin of record in recognition of services rendered by those who die in line of duty while in the active military service ***."

38 C.R.R. (1949 ed.) Section 8.18

National Service life insurance will lapse and terminate while the insured is in the active military or naval service of the United States:

(a) If the insured fails to designate a method of payment of premiums at the time of applying or at any time elects to pay premiums on said insurance otherwise than by allotment of pay and such premiums are not paid prior to expiration of the grace period.

(b) Except as provided in #8.20, if the service department shall discontinue the allotment and premium is not otherwise paid prior to expiration of the grace period.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 476

ROSA GRIFFIN, ADMINISTRATRIX OF THE ESTATE OF GEORGE GRIFFIN, SR., DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas, consisting of a statement, findings of fact, discussion, and conclusions of law (R. 9-24), is reported at 115 F. Supp. 509. The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. 14-23) is reported at 216 F. 2d 217.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1954 (Pet. App. 24). The petition for a writ of certiorari was filed on December 11, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether uncollected service pay earned by a serviceman prior to his absenting himself without leave must be applied to continue his National Service Life Insurance in effect in circumstances where (1) pursuant to the provisions of pertinent Army regulations, his insurance allotment had been terminated by reason of the absence without leave and (2) under pertinent Veterans Administration regulations the insurance lapses at the end of the grace period if a serviceman's allotment is terminated and premiums are not otherwise paid.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Section 602 of the National Service Life Insurance Act of 1940, as amended, 38 U. S. C. 802; of Army Special Regulation 35-1900-5; and of the Regulations of the Veterans Administrator are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

On October 11, 1950, George Griffin, Jr., then a member of the Army Enlisted Reserve Corps, entered upon extended active duty (R. 11). On October 13, 1950, he executed an application for level-premium five year term National Service Life In-

surance, in the amount of $10,000, naming his father, George Griffin, Sr., as principal beneficiary and his mother, petitioner here, as contingent beneficiary (R. 11, 33). Simultaneously therewith, he executed standard Form DD234, authorizing a monthly allotment from his pay, in the amount of $7.20, to pay the premiums on the insurance (R. 51). The application was approved, effective November 1, 1950, and an allotment was made from the insured's service pay to cover the November and December premiums (R. 33).

On November 28, 1950, the insured absented himself without leave from his assigned station, Camp Stoneham, California, and did not return to military duty at any time prior to his death, which occurred on March 24, 1951, at the home of his parents in Clarksville, Arkansas (R.11). At the time he departed from his station, he was placed in a non-pay status but was credited with $64.31 in accrued service pay, covering the period from November 1, 1950, to November 28, 1950 (R. 13. On February 28, 1951, Captain William L. Otis at Camp Stoneham, following the procedure detailed in Army Special Regulation 35-1900-5, 10 October 1950 (*infra,* pp. 18-19), executed another Form DD234 for the purpose of terminating the insured's allotment as of December, 1950 (R. 13, 49, 53). On March 6, 1951, as required by the regulation, the allotment was discontinued effective the end of November, 1950 (R. 13).

On May 2, 1951, George Griffin, Sr. filed a claim with the Veterans Administration, for the pro-

ceeds of the serviceman's insurance (R. 12). On January 23, 1952, he was advised that the claim was disallowed on the ground that the insurance had been cancelled, effective November 28, 1950, on the determination by the Veterans Administration on October 11, 1951, that the insured had deserted from the armed forces (R. 12, 57). On March 28, 1952, this suit was instituted to recover the proceeds of the policy (R. 1-5).[1]

In its answer to the complaint, the Government alleged that the insurance was not in force at the time of the serviceman's death for two wholly independent reasons (R. 5-7). In addition to the matter of the forfeiture of the policy on the administrative determination of desertion, it was asserted that, under the applicable regulations of the Veterans Administration, the insurance had lapsed at the end of December, 1950 by reason of the failure of premium payments subsequent to November, 1950 (R. 6).

On October 15, 1953, the District Court entered judgment against the United States (R. 24-25). As to the question of lapse for non-payment of premiums,[2] it ruled that the Army, having in its possession accrued service pay owing the insured, was

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[1] During the pendency of the suit, Griffin, Sr. died and petitioner, as administratrix of his estate, was substituted as party plaintiff (R. 9).

[2] Regarding the question as to forfeiture, which was not raised by the Government in the Court of Appeals, the District Court found on the evidence that the insured had not deserted from the Army (R. 15-20).

not empowered to discontinue the insurance allotment (R. 20-23). Recognizing that Special Regulation 35-1900-5 provides that such allotments "will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the allotter from which the deduction may be made" (see p. 19, *infra*), the court held that "a proper construction of this regulation is that such allotments are to be discontinued only when there is no accrued active service pay from which to deduct the amount of said allotment", adding that any other construction would render the regulation invalid (R. 20-21). In so holding, the court read Section 602(m)(1) of the National Service Life Insurance Act, *infra*, p. 17, as imposing upon the service branches, in cases where the insured elects to have premiums paid by allotment, an obligation to deduct premiums out of any accrued active service pay owing to the serviceman (R. 20-21).

On October 29, 1954, the Court of Appeals reversed (Pet. App. 14-24). It held that Special Regulation 35-1900-5 required the discontinuance of the insured's allotment and that the regulation was valid (Pet. App. 17, 22). The court further held that, the allotment having been discontinued, the Government was under no duty to apply the accrued service pay to prevent a lapse of the insured's policy for non-payment of premiums (Pet. App. 22-23).

ARGUMENT

Under the plain terms of applicable administrative regulations, the Army was under a duty to ter-

minate the serviceman's National Service Life Insurance allotment as of November 28, 1950, the date on which the insured absented himself without leave, and, premiums not being otherwise paid, the policy lapsed at the expiration of the grace period, some three months prior to the insured's death. The court below was clearly correct in holding that these regulations are valid and further review by this Court is not warranted.

1. It is undisputed that when the insured absented himself without leave on November 28, 1950 he was in a non-pay status continuously from that day until his death on March 24, 1951.[3] Accordingly, in subsequently terminating the serviceman's insurance allotment, as of November 30, 1950, the Army finance officers simply were complying with the provisions of paragraphs 1a(6) and 3b(1)(b) of Special Regulation 35-1900-5 (*infra*, pp. 18-19), which call for the automatic discontinuance of, *inter alia*, the Class N (N. S. L. I. premium) allotment of a serviceman in a non-pay status for ten days or more; such discontinuance to take effect "as of the last day of the most recent month *during which sufficient pay accrues* to the

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[3] By statute and Army regulation, neither pay nor allowances will accrue to any person in the military service during unauthorized absences in excess of 24 hours, unless excused as unavoidable. See Section 4 of the Act of August 9, 1946 (60 Stat. 963, 964), as amended by Section 1 of the Act of August 4, 1947, 61 Stat. 748, 37 U.S.C. 33(b); AR 35-1030, 10 January 1950, para. 3a.

allotter from which the deduction may be made," [Emphasis added.] [4]

Contrary to petitioner's belief (Pet. p. 11), the termination of an insurance allotment pursuant to the authority of SR 35-1900-5 does not work a forfeiture of the serviceman's policy. Rather, it has the sole effect of transferring to him the responsibility for the payment of the premiums necessary to keep the policy in effect. Subject to certain exceptions which do not apply in the circumstances of this case (see pp. 8-10, *infra*), the applicable regulations of the Veterans Administrator provide that National Service Life Insurance will lapse if the service department discontinues the serviceman's allotment and *the premium is not otherwise paid* prior to the expiration of the 31 day grace period. 38 C. F. R. (1949 ed.) § 8.18 (*infra,* pp. 19-20). Cf. 38 C. F. R. (1949 ed.) §§ 8.14, 8.16, 8.20. Here, no premium payments were made by the serviceman himself, or by anyone on his behalf subsequent to November 30, 1950.[5] Therefore, the

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[4] While Special Regulation 35-1900-5 was promulgated on October 10, 1950, prior Army regulations dictated the same procedure. Cf. n. 7, *infra*, p. 10.

[5] Petitioner's assertion (Pet. p. 10) that the Court of Appeals unjustifiably assumed that the premiums were not paid from another source after the insured absented himself without leave has no merit. In its answer to the complaint, the Government specifically denied that the premium due January 1, 1951, had been paid (R. 6). At all times during the trial, as well as in her brief on appeal, petitioner accepted the theory that the single inquiry on the question of lapse was whether the insured's accrued service pay should have been applied to keep the policy in force.

policy was not forfeited as petitioner contends, but rather, like any other insurance policy where the required premiums are not paid, lapsed, here on January 1, 1951, for non-payment of premiums.[6]

2. Seeking to avoid these regulations, petitioner argues that SR 35-1900-5, as here applied, is invalid because contrary to the National Service Life Insurance Act (Pet. p. 10). As the court below recognized, however, the established practice of automatically discontinuing the insurance allotment of a serviceman in an absent-without-leave status has received Congressional recognition (Pet. App. 22). Furthermore, the practice is authorized as a necessary adjunct of the allotment system.

(a) As initially enacted in 1940, the National Service Life Insurance Act provided in Section 602(m) simply that premiums could at the election of the insured be deducted from his service pay (54 Stat. 1011). By Section 6 of the Act of August 1, 1946, 60 Stat. 781, 784, Section 602(m) was amended by the addition of the following as subsection (2):

> In any case in which the insured provided for the payment of premiums on his insurance by

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[6] The serviceman expressly authorized the deduction of two months premiums from his November, 1950, pay (R. 51). Accordingly, on November 30, 1950, the premiums due on November 1, 1950, and December 1, 1950, had been allotted. While the serviceman had a thirty-one day grace period in which to pay the premium due on January 1, 1951, the Veterans Administration Regulations provide that "[i]f a premium is not paid prior to the expiration of the grace period, the effective date of the lapse shall be the due date of the premium in default". 38 C.F.R. (1949 ed.) §8.15.

authorizing in writing the deduction of premiums from his service pay, such insurance shall be deemed not to have lapsed so long as he remained in active service prior to [August 1, 1946,] *notwithstanding the fact that deduction of premiums was discontinued because—*

* * * * *

(B) *the insured was absent without leave,* if restored to active duty; [Emphasis added]

The reason for this addition was set forth in the Senate and House Committee Reports in these terms:

Under regulations issued by the War Department, an allotment for deduction of premiums was *automatically* discontinued if the insured was absent without leave 15 days or more. Upon restoration to active duty, the individual was not advised that his allotment had been terminated, nor was he ever offered an opportunity to make a new allotment. Some such individuals also died believing their insurance was in force. In still other cases, a veteran sentenced by court martial was restored to active duty and required to engage in combat, or was killed in combat while confined in a combat area or on a ship engaged in combat. In some instances, insurance had lapsed because the veteran was on a nonpay status. Your committee is of the opinion that payment of insurance [benefits] should not be de-

nied under the circumstances stated. [Emphasis added.] [7]

Thus, Congress was aware that Army regulations require the *automatic* termination of allotments when a serviceman is absent without leave for a stipulated period. And, rather than invalidating these regulations, or prohibiting the Army from discontinuing allotments in particular circumstances, Congress chose instead to permit the Army to discontinue allotments but to relieve the serviceman of the consequences in certain specified situations. These relief provisions, of course, afford no comfort to petitioner; they do not apply here, both because the insured's absence took place in 1950 (i.e., subsequent to August 1, 1946), and because there was no restoration to active duty.[8]

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[7] S. Rept. 1705, 79th Cong. 2nd Sess. p. 5; H. Rept. 2002, 79th Cong. 2nd Sess. p. 6. The committee reports had reference to AR 615-300, 25 March 1944, para. 11b (1) which provided for the automatic termination of allotments when the serviceman was in a non-pay status for 15 days. This regulation was superseded by AR 615-300, 17 March 1947, which in paragraph 9b reduced the period to 10 days. The provisions of this regulation were carried over into SR 35-1900-5, the regulation under which the insurance allotment was terminated.

[8] Even if the posthumously awarded certificate of honorable service (R. 12) were to be considered the equivalent of an honorable discharge (Pet. p. 11), it was hardly the equivalent of a restoration to active duty. Nor, as both courts below recognized, did it alter the fact that at the time the allotment was terminated the serviceman was absent without leave. Further, while it would not assist petitioner even if the unauthorized absence subsequently had been excused, the record does not show that this took place.

(b) Quite apart from the 1946 amendment to Section 602(m), there is no basis for petitioner's assertion that SR 35-1900-5 conflicts with the Act. The regulation is a reasonable exercise of the discretion conferred upon the Secretary of the Army to permit military personnel to make allotments from their service pay "under such regulations as he may prescribe". Section 16 of the Act of March 2, 1899, c. 352, 30 Stat. 981, as amended, 10 U. S. C. 894.

Indeed, it is apparent upon analysis that the regulation does no more than to give content to the commonly understood fiscal meaning of the term "allotment"—namely, that *portion* of the individual's salary, wages, or other compensation which is *specifically allocated* for one or more particular purposes. See Webster's New International Dictionary (2nd ed. 1949) p. 70; *United States* v. *Jones*, 101 F. Supp. 128, 131 (S. D. W. Va.). And the adoption of an allotment system, permitting deductions at the serviceman's request only from currently accruing pay, is dictated by several important administrative considerations.

One such consideration is that, even where the absentee serviceman has authorized solely an insurance allotment, there may be other charges against his accrued pay. For example, the expenses incurred by the Government in connection with the apprehension of a serviceman who is absent without leave are chargeable against him. AR 35-1570, 14 May 1953, paras. 2b, 6. See also AR 35-2620, 30 June 1943, para. 3. Thus, when a serv-

iceman departs from his assigned station without leave, a potential indebtedness to the Government immediately arises. Whatever credit the serviceman has at the time, after the authorized deductions are made for the period during which the credit accrued, appropriately serves as security not only for the satisfaction of this indebtedness, should it materialize, but also for the satisfaction of other obligations running to the Government which the passage of time may bring to light. Cf. 10 U. S. C. 871-875.

Additional considerations come into play when the serviceman has authorized more than one allotment from his pay, *e. g.* one for insurance and another for the support of his dependents.[9] As long as he remains on pay status, there will be sufficient funds to keep both allotments in force.[10] But once the serviceman's pay has been terminated, the finance officer of his organization, if required to continue deductions out of accrued pay, might

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[9] Army personnel are authorized to make allotments for the following purposes, among others: purchase of war (defense) bonds; additions to savings accounts in banks or in the postal savings system; payment of premiums on United States Government Insurance, National Service Life Insurance or commercial insurance; support of dependents; repayment of certain types of loans. See AR 35-1900, 16 August 1949, paras. 2, 5a.

[10] An enlisted man may only allot that portion of his pay, base and otherwise, which will leave, after required reductions, including federal withholding income tax, have been made, "a monthly balance of $10., or such other amount as may be determined by his commanding officer to be necessary to meet his essential personal needs." AR 35-1900, 16 August 1949, para. 7(2).

have to choose from among numerous alternative courses of action. The insurance deduction might be continued for as long as the credit would allow, the dependency deduction being forthwith terminated; the converse arrangement might be adopted; or both deductions might be continued until the credit becomes exhausted.

At most, only one of these alternatives could possibly accord with the desires of the particular serviceman. And, since an absentee without leave does not customarily leave instructions as to the disposition of his accrued pay, the responsible officers would be placed in the impossible position of either speculating as to his preference or making an independent judgment as to the procedure that would best serve his interests. The path always would be open for the absentee, his dependents and/or the beneficiaries of his National Service Life Insurance later to claim, aided by hindsight, that the selection made by the Army was improper.

3. Petitioner's assertion (Pet. p. 12) that the decision below conflicts with *United States* v. *Morrell*, 204 F. 2d 490 (C.A. 4), certiorari denied, 346 U.S. 875, is without substance. There, the Government was indebted to the insured by reason of the latter's *overpayment of premiums* and the Fourth Circuit held, after determining that to do so would not conflict with the governing statute and applicable administrative regulations, that the resultant credit in the insured's favor should have been used by the Veterans Administration to pre-

vent a lapse of his National Service Life Insurance for non-payment of premiums. At the same time, however, the court expressly distinguished and approved [204 F. 2d at 493] its earlier decision in *Mikell* v. *United States,* 64 F. 2d 301. In *Mikell,* the beneficiary had claimed, as does petitioner here, that the Government should have applied accrued service pay owing the insured towards the payment of premiums. In rejecting this contention, Judge Parker had noted that [64 F. 2d at 302]:

> * * * When the government goes into the business of insurance, it is permissible to apply to it the rules applicable to insurance companies so far as transactions relating to insurance are concerned, but no farther; and an insured who defaults in the payment of premiums on a government policy is not entitled to have his insurance continued in force merely because in some of its various activities, not connected with insurance, the government is indebted to him. * * *.

We submit that the instant case falls squarely within this principle, which, it should be noted, is followed with respect to commercial insurance as well. See *e.g. Leffingwell* v. *Grand Lodge A.O. U.W.,* 86 Iowa 279, 53 N.W. 243; *Pister* v. *Keystone M. Ben. Asso.,* 3 Pa. Super. Ct. 50; *Caywood* v. *Supreme Lodge K.L.H.,* 171 Ind. 410, 86 N.E. 482.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1955.

APPENDIX

1. Section 602(m) of the National Service Life Insurance Act of 1940 c. 757, 54 Stat. 1008, as amended, 38 U.S.C. 802(m) provides as follows:

> (1) The Administrator shall, by regulations, prescribe the time and method of payment of the premiums on such insurance, but payments of premiums in advance shall not be required for periods of more than one month each, and may at the election of the insured be deducted from his active-service pay or be otherwise made: *Provided,* That an amount equal to the first premium due under a national service life-insurance policy may be advanced from current appropriations for active service pay to any person in the active service in the Army, Navy, Marine Corps, or Coast Guard, which amount shall constitute a lien upon any service or other pay accruing to the person for whom such advance was made and shall be collected therefrom if not otherwise paid: *Provided further,* That no disbursing or certifying officer shall be responsible for any loss incurred by reason of the advance herein authorized: *And provided further,* That any amount so advanced in excess of available service or other pay shall constitute a lien on the policy within the provisions of section 454a of this title.
>
> (2) In any case in which the insured provided for the payment of premiums on his insurance by authorizing in writing the deduc-

tion of premiums from his service pay, such insurance shall be deemed not to have lapsed or not to have been forfeited because of desertion under section 812 of this title, so long as he remained in active service prior to August 1, 1946, notwithstanding the fact that deduction of premiums was discontinued because—

(A) the insured was discharged to accept a commission; or

(B) the insured was absent without leave, if restored to active duty; or

(C) the insured was sentenced by court martial, if he was restored to active duty, required to engage in combat, or killed in combat.

In any case in which the insured under any insurance continued in force by the provisions of this paragraph died while such insurance was so continued in force, any premiums due on such insurance shall be deducted from the proceeds of the insurance. Any premiums deducted or collected on any such insurance shall be credited to the national service life insurance appropriation and any payments of benefits on any such insurance shall be made directly from such appropriation.

2. The pertinent provisions of Army Special Regulation 35-1900-5, 10 October 1950, are as follows:

Paragraph 1a(6) When a person is in a continuous nonpay status for 10 days or more, e.g., AWOL, the personnel officer will prepare

separate Forms 234 for each class of allotments (E, D and N) and forward such forms promptly to the disbursing officer having custody of the person's military pay record * * *. Upon receipt of Forms 234, the disbursing officer will discontinue deductions of such allotments by closing out the entry on the Military Pay Record (NME Form 113) of the individual concerned. * * *.

* * * * *

Paragraph 3b (1)(b) Class D and N allotments will be discontinued as of the last day of the most recent month during which sufficient pay accrues to the allotter from which the deduction may be made.

3. The pertinent provisions of the Regulations of the Veterans Administrator are as follows:

(a) 38 C.F.R. (1949 ed.) Section 8.18

National Service life insurance will lapse and terminate while the insured is in the active military or naval service of the United States:

(a) If the insured fails to designate a method of payment of premiums at the time of applying or at any time elects to pay premiums on said insurance otherwise than by allotment of pay and such premiums are not paid prior to expiration of the grace period.

(b) Except as provided in § 8.20 if the service department shall discontinue the allotment

and premium is not otherwise paid prior to expiration of the grace period.

(b) 38 C.F.R. (1949 ed.) Section 8.20

(a) Where the insured provided for payment of the premiums by authorizing in writing the deduction of premiums from his service pay, insurance shall be deemed not to have lapsed while he remained in active service, prior to the date of enactment of Public Law 589, 79th Congress, approved August 1, 1946, provided the deduction of premiums was discontinued because * * * (2) the insured was absent without leave, if restored to active duty; * * * If the insured died while the insurance was continued in force as provided above, payment of the benefits shall be made directly from the National Service life insurance appropriation, and any premiums due on such insurance shall be deducted from the proceeds of the insurance.

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IN THE

Supreme Court of the United States

(OCTOBER TERM 1954)

ROSA GRIFFIN, Administratrix of the Estate of GEORGE GRIFFIN, SR., Deceased ..... Petitioner

vs. No. 476

UNITED STATES OF AMERICA ..... Respondent

PETITIONER'S REPLY TO BRIEF OF RESPONDENT

The respondent in this case has not questioned the basic grounds for granting certiorari set out in the petition, but has argued the merits of the respondent's case.

It is not denied that the Court of Appeals has decided an important question of Federal Law which has not been, but should be settled by this Court. It is not denied that the Court of Appeals has decided a Federal question in a way in conflict with the applicable decisions of this Court. In fact, the brief of the respondent wholly ignores these two questions and touches only the basic ground that the decision is in conflict with the decision in the case of U. S. vs. Morrell, 204 F. 2d 490, asserting that it is distinguishable on fact, but the respondent does not assert that it is distinguishable on principle.

In arguing the merits of the case, the respondents make the bald assertion on Page 7 "Here no premium payments were made by the serviceman himself, or by anyone on his behalf subsequent to November 30, 1950." Then in the footnote justifies this assertion by saying, "In its answer to the complaint, the Government specifically denied

that the premium due January 1, 1951, had been paid"; but the respondent does not contend that any evidence whatever was offered to support this defense alleged in the complaint. The record shows that no evidence was offered. While the rules for the admissibility of evidence have been greatly liberalized, we have never yet understood that allegation supplies the absence of proof.

The respondent argues that by reason of an amendment passed by Congress in 1946, continuing National Service Life Insurance in force under certain conditions, that Congress thereby intended to increase the power of the Army to destroy insurance in other respects.

The 1946 Act as quoted by the respondent was amended by the Service Men's Indemnity Act of 1951, which act is retroactive by its terms and would entitle the family of this type service man to the indemnity since he was not a deserter. The government by failing to appeal from this decision of the trial court has admitted that he is not a deserter, but the indemnity has not been offered and the position has been taken by the counsel for respondent that suit cannot be brought under the Indemnity Act. In the amendment to the 1946 Act cited by respondent an additional clause was added to provide, "such insurance shall be deemed not to have lapsed or **not to have been forfeited under Section 812** of this title so long as he remained in active service prior to August, 1946 ***."

In the House Mangers report on the conference on this bill it is reported that the black face clause was inserted in accordance with an amendment by Senator Aiken of Vermont and is in line with section 8 of the Indemnity Act of 1951 providing for the indemnity in the event of restoration to active service and then the report states that restoration to active duty should include restoration of insurance benefits.

It is clear that Congress was approving the holding of this Court in U.S. v. Kelly, 82 U.S. 36 which holds that an honorable discharge is a formal final judgment on the entire military career and removes any charge or impediment in the way of receiving bounty.

A clear intention to extend the benevolent purposes of the act cannot be distorted into a grant of power to destroy those same benevolent purposes.

The petitioner submits that limitation upon the Army's power to, in effect, forfeit insurance by regulation, is not a justification for an extension of that power. The respondent then, in the footnote, suggests that the honorable service certificate is not the equivalent of the restoration to active duty, even though it is the equivalent of an honorable discharge. This certificate of honorable service can be issued only to those who die in line of duty while in the active military service. (Army Regulation 600-45-3, Petitioner's Appendix 3-32).

The respondent's whole case is based upon Army Regulations.

It cannot be contended on the one hand that Army Regulation 600-45-3 is meaningless and can be ignored at will or that it is a regulation merely for the purpose of salving the feelings of the next of kin of those who die in the military service of our country, but when a dollar is involved, it may be disregarded and on the other hand, that Regulation SR 36-1900-5 shall be invoked at the will of a commanding officer for the purpose of destroying the insurance benefits of that same soldier.

The Secretary of the Army, under the Army's own regulation could not have issued the certificate of honorable service, unless the soldier died "in line of duty while in the active military service of his country." It, therefore, follows that at some point the Secretary of the Army, in making a final formal judgment found that the deceased serviceman, if ever AWOL, had been restored to active service.

The respondent tacitly admits that the certificate is the equivalent of an honorable discharge, which under the decisions of this Court, is a formal final judgment on the entire military career of the service man. It is tacitly admitted by the fact that the finding of the trial court was not challenged on appeal.

It is also clearly the intent and purpose of Congress to extend even the benefits of the free indemnity to all who died in active service and who were not guilty of treason, spying or desertion. Any regulation promulgated by the Army for the purpose of destroying this intent is wholly void as it was held by the Trial Court in this case.

Petitioner could, and perhaps should, argue this case on the merits as extensively as done by the respondent, but the limited knowledge of counsel for petitioner indicates argument on the merits should be made after the petition for certiorari is granted. As stated before, the basic grounds for granting certiorari have not been really challenged by respondents brief.

Petitioner respectfully prays that this Court grant Certiorari herein and that upon final hearing and consideration reverse the Court of Appeals and restore the judgment of the Trial Court.

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